No. 80-1397

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In the Supreme Court of the United States

October Term, 1980

RONALD CARABBIA,
and
PASQUALE CISTERNINO,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTIONS OF LAW

1. Where the facts show that an eyewitness identification was not influenced by a pre-trial photo array identification, the defendant's right to a fair trial is not prejudiced by the testimony of the eyewitness.

2. The trial court may properly restrict irrelevant and immaterial cross-examination where the subject matter of the cross-examination is not pertinent to the trial issues or to the protection of a defendant's constitutional rights.

3. Where a defendant fails to establish standing to object to a search, a trial court is legally justified in denying the defendant a hearing on a Motion to Suppress.

4. Where a defendant fails to establish a right to privacy in the area searched, he lacks standing to object to the search and has no right to challenge the legality of the search as it relates to him.

5. A prosecutor's closing argument should be considered in light of the nature of the case, the facts presented during trial, and the strength of the State's case.

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To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question involved which would require this Court to review this case.

The question herein presented was raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed the convictions. The Supreme Court of Ohio overruled the defendants' Memorandum in Support of Jurisdiction, and affirmed the convictions.

The Ohio Courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

HISTORY OF THE CASE

On December 5, 1977 the defendants were indicted for the aggravated murder of Daniel Greene. The jury selection for trial began on February 21, 1978; the presentation of evidence began on March 29, 1978. On May 25, 1978, both defendants were found guilty of aggravated murder and aggravated arson.

Both defendants appealed their convictions to the Court of Appeals for the Eighth District. On July 10, 1980 the Court of Appeals upheld the convictions of both the defendants.

Subsequently, both defendants filed a Memorandum in Support of Jurisdiction with the Ohio Supreme Court. The Ohio Supreme Court denied each defendant's Memorandum in Support of Jurisdiction.

Now, both defendants file this Petition for Writ of Certiorari.

STATEMENT OF FACTS

For over two years before he was murdered, people involved in organized crime in the Cleveland area had been trying to kill Daniel Greene. Until October 6, 1977, the closest they had come to killing Greene was when they bombed his home on Waterloo Road on May 12, 1975 at which time Greene sustained minor injuries.

Due to the failure of the Cleveland organization to kill Greene, outside help was sought. Between May and July of 1976, Raymond Ferritto received a phone call from James Fratianno. Fratianno told Ferritto he wanted to meet with him in Warren, Ohio. The day after the phone call Ferritto and Fratianno met at the Town and Country Motel in Warren. Fratianno explained to Ferritto that there were some problems in Cleveland; that someone was trying to muscle in on the Cleveland operations; and that Ferritto should talk to Tony Del Santer because Del Santer might have some work (killing) for him.

A couple of weeks after that meeting, Ferritto received another phone call from Fratianno. On the following day, Ferritto met with Fratianno and Del Santer at Cherry's dinner club in Warren; at that meeting Ferritto was introduced to Tony Del Santer by Fratianno. Fratianno then left the two of them alone.

Del Santer explained to Ferritto that Cleveland was having trouble with John Nardi and Greene because the two of them were trying to muscle in on Cleveland's gambling operations, and that they had to be taken care of. Ferritto said he was interested and wanted to know what was in it for him. Del Santer said he would check with Jack White (Licavoli). (This meeting with Del Santer occurred in July or August of 1976).

Two to three weeks after the meeting with Del Santer, Ferritto received a phone call from defendant Ronald Carabbia. Carabbia told Ferritto to meet with him at Cherry's in Warren, Ohio.

It was either on the same night of the Carabbia call or the following night Ferritto went to Warren and met with Carabbia, Licavoli, Del Santer and defendant Cisternino. At that meeting, Ferritto was told that in exchange for killing either or both Greene and Nardi he would

receive either money or he would be made a member of the organized crime syndicate commonly referred to as the Cosa Nostra.

Ferritto agreed to take the work and was told that when the groundwork was laid for the killings, he would be contacted. Cisternino was supposed to take care of all the preparations for the killings, to include recording the habits and schedules of the intended victims.

In November, 1976, Ferritto called Carabbia and asked him about the status of the Greene and Nardi contracts. Carabbia said he hadn't heard from Cleveland.

The next time Ferritto discussed the matters of the killing contracts was in April of 1977.

Ferritto called Carabbia in April of 1977 to find out if the deal to kill Greene and Nardi was still good. Ferritto had read where there were previous attempts on Nardi's life and thought the deal was off.

In April of 1977 Ferritto met with Del Santer, Carabbia, Cisternino and John Calandra at either Cherry's or the Living Room (also a supper club). John Calandra was representing Licavoli. Ferritto was told the deal to kill Greene and Nardi was still good, but that the schedules of Greene and Nardi were erratic. They also discussed Ferritto's payment.

Thereafter Ferritto made a few trips to Cleveland and received some license numbers of Greene's cars from Cisternino. Cisternino also showed Ferritto where Greene was living, where he ate (Kenny King's), and Greene's trailer on Waterloo Road. (That was Greene's office because the building he lived in was destroyed by the bombing in 1975.)

During the summer of 1977 Ferritto made many trips to Cleveland to meet with Cisternino on the deal to kill

Greene and Nardi. Between May and August, 1977, Ferritto made ten to twelve trips to Cleveland.

When Ferritto came to the Cleveland area he stayed at either the Sheraton Inn, Holiday Inn, or Ramada Inn on Euclid Avenue, and once stayed at the Holiday Inn Downtown. All of this was substantiated by receipts from the various inns and by a motel key found at 919 Rondel.

In May of 1977, John Nardi was murdered in the same fashion as Greene was to be murdered. After the murder of Nardi, Cisternino and Allie Calabrese drove to Erie, Pennsylvania (where Ferritto lived) and gave Ferritto a blue Plymouth. At that time, Cisternino told Ferritto of an unsuccessful attempt they had made on Nardi and Greene's life; the bomb was planted on Nardi's car but they forgot to set the arming switch, so the bomb did not go off when the remote control switch was thrown. Cisternino also told Ferritto of other unsuccessful attempts on Nardi's life where Cisternino fired at Nardi at point blank range with a shotgun and missed; also, Cisternino, Calabrese and another person fired at Nardi with a rifle and missed.

At that meeting with Cisternino and Calabrese, Ferritto was given the necessary papers to transfer the Plymouth.

By using Marybeth Mitchell, Larry Fabrizi, Frank Thomas, and a high school kid, Ferritto transferred the title of the Plymouth to the fictitious name of Guy Mitchell, and had the new Pennsylvania plates put on the car. (This was to be the get-away car used by Carabbia and Ferritto after they killed Greene.)

Thereafter Ferritto started coming to Cleveland in an attempt to locate and kill Greene.

It was during these trips to Cleveland that Ferritto began in earnest to stalk and kill Greene. His main contact in Cleveland was Cisternino.

In August of 1977, Ferritto met with Del Santer and Licavoli at the Living Room in Warren. He told them of the problems he was having with Cisternino. Cisternino was not providing Ferritto with the proper assistance. One week after this meeting, Del Santer died (a natural death).

After attending Del Santer's wake (Ferritto, Fratianno, Licavoli, Calandra and Cisternino all attended the wake), Ferritto discussed the killing of Greene with Fratianno, Licavoli and Calandra at Sabatino's Restaurant in Warren. Licavoli told Ferritto that if he needed anything Calandra would get it for him. Ferritto said he needed money for expenses and Licavoli said he would see that he gets some. Ferritto was also told that after Greene was killed, Ferritto would be taken to Detroit and made a member of the organization and that he would get 25% of the gambling take from Youngstown and Warren. Ferritto was also told that they were getting ready to put a wire tap on Greene's phone and that they should be getting tapes from that wire tap soon.

A few days after the Del Santer funeral, Carabbia met with Ferritto and gave him $5,000 for expenses.

Toward the end of August, 1977, Ferritto went to Cleveland and met with Cisternino at the motel in which Ferritto was staying. Cisternino gave him two tape cassettes that were recorded from the wire tap on Greene's phone. Ferritto went to an Uncle Bill's store and bought a cassette tape recorder to play the bugging tapes. (This is substantiated by Murial Robinson, the salesgirl (Vol. 12, R. 4611-45), and the cash register tape of the sale.) Ferritto described the salesgirl and location of the Uncle

Bill's store where he bought the recorder. When Ferritto tried to play the tapes, they sounded garbled. Cisternino said he would take the recorder back to Marconi to see if he could correct the problem. (The search of Marconi's house revealed a tape cassette recorder box exactly like the one purchased by Ferritto. The recorder used by Ferritto has never been recovered; Ferritto doesn't know what happened to the recorder.) Ferritto went back to Erie, Pennsylvania.

About one week later, Ferritto went back to Cleveland and met with Cisternino. Cisternino had some more tapes. (The tapes would go from Thomas Sinito to Angelo Lonardo to Cisternino or Ferritto.)

A few days after the meeting with Licavoli at the Del Santer funeral, Ferritto met with Carabbia and Carabbia gave Ferritto $5,000—the expense money promised by Licavoli.

Ferritto met with Cisternino in Cleveland numerous times for the purpose of killing Greene. Beside meeting Cisternino at the various motels at which he would stay, Ferritto also met with Cisternino at a house on Kipling Avenue on Cleveland's east side, Cisternino's hideout.

A search of this house later revealed the fingerprints of Cisternino, Calabrese, and Joseph Bonnarigo on various documents; numerous F.B.I. and local police department radio frequencies written by Carmen Marconi; and a motel key bearing the room number of a room at which Ferritto stayed during one of his visits.

During September, 1977, Ferritto and Cisternino planned to kill Greene by using a device that can best be described as a bomb box. A steel box with one side open and four railroad spikes as legs was fabricated. Ferritto and Cisternino drove to Greene's apartment house and

planted the metal box near the front door. Near the box a plastic bottle filled with nails and a flammable liquid was placed. Their original intention was to put a bomb in the metal box and place the bottle of nails and liquid in front of the bomb. The bomb box would then be placed so that the opening of the box would face the vicinity of the front door to the apartments. When Greene would come within range of the bomb box, the bomb would be detonated blasting the nails and flammable liquid at Greene. The idea was abandoned because there were too many old people in the building that might have been injured. (Cisternino had brought a bomb in a shopping bag but they decided not to use it.) The bomb box was found and later turned over to the Cleveland Police Department. Ferritto went back to Erie, Pennsylvania the next day.

The following week (the first Monday in October) Carabbia called Ferritto and told him something had come up and that they should meet in Struthers, Ohio. On Tuesday, Ferritto went to Struthers and met with Carabbia. The two of them drove to Mosquito Lake, outside of Warren, Ohio. Once at Mosquito Lake, Carabbia and Ferritto met with John Calandra, Licavoli, Cisternino and Angelo Lonardo. They all went to a boat to discuss the killing of Greene. A tape was played that revealed a dental appointment made for Greene by his girl friend; the appointment was made for Thursday at 2:30 p.m. It was decided that they would try to kill Greene Thursday at 2:30 p.m. (October 6, 1977).

(Previously, Anthony Liberatore hired two men to assist in the killing of Greene—Louis Aratari and Ron Guiles.)

Ferritto went back to Erie, packed some overnight articles and went to Cleveland on Wednesday. Ferritto

met Cisternino at the parking lot of a Holiday Inn and the two of them proceeded to Apt. 333 in the Winchester Hills Apartment Building; they arrived at about 12:30 p.m. Cisternino had a key to the apartment. The apartment belonged to Cisternino's friend—Zolton Kalman. (Kalman fled the area and still is in hiding.) About an hour later, Carabbia arrived at the apartment. Ferritto and Carabbia stayed there overnight; Cisternino left that evening.

Thursday morning Cisternino arrived and brought with him a police radio scanner (monitor): he also brought the components of the bomb that would later be used to kill Greene. With Ferritto assisting him, Cisternino assembled the bomb. (Ferritto earlier purchased some black electrical tape at a Gold Circle store. A later search of Apt. 333 revealed a Gold Circle purchase label in an ashtray. The search also revealed a Tennelec scanner manual containing the prints of Cisternino, Calabrese and Marconi.)

Between 1:00 and 1:30 p.m. on Thursday, October 6, 1977, Raymond Ferritto and Ronald Carabbia left Apt. 333 to go to Brainard Place to kill Greene. Cisternino stayed at the apartment to listen to the radio scanner for the purpose of monitoring police and F.B.I. reactions to the bombing.

Ferritto drove a blue Plymouth (the car Cisternino and Calabrese had brought him months before, and the car he drove from Erie to Cleveland) and Carabbia drove a Chevrolet Nova (the bomb car Cisternino provided); Ferritto followed Carabbia to Brainard Place, a small plaza in Lyndhurst, Ohio; they arrived at about 2:00 p.m. Both cars were parked in the lot and they waited for Greene to arrive. They had waited about 10 minutes when they met with Aratari and Guiles (two other men hired by Anthony Liberatore to kill Greene). All four men talked about how they would try to kill Greene. Aratari and Guiles were

going to try and shoot him; if that didn't work, the bomb would be used.

Later Greene arrived in a brown Lincoln and went into the Medical Building. Ferritto waited until the parking space next to Greene's car became vacant and then he parked the Nova (bomb car) next to Greene's car so that the passenger door of the Nova was next to the driver's side of Greene's car. Ferritto then got the bomb and placed it in a metal box fastened to the inside of the passenger door of the Nova. The bomb was to be detonated by a remote control device.

Ferritto and Carabbia then got into the blue Plymouth and drove to a phone booth at the corner of Brainard and Cedar Roads to wait for Greene to get into his car.

Greene came out of the Medical Building and was walking to his car. Ferritto and Carabbia got into the blue Plymouth and started to turn right onto the ramp leading to the freeway. At that same time, Debbie and Gregory Spoth were attempting to turn left onto the same ramp; Debbie Spoth was driving. Debbie Spoth hesitated for a few seconds because Ferritto was not turning as he should have and Debbie did not know whether to wait for him to turn or to pull in front of him. (Both Spoths later identified Ferritto as the driver of the blue Plymouth.)

Eventually Debbie Spoth turned in front of Ferritto. As the Spoth car and Ferritto car were slowly driving towards the ramp to the freeway, Greene reached his car, and Carabbia, using a remote control device, detonated the bomb and killed Greene.

Ferritto then pulled his car around the left side of the Spoth car. Debbie Spoth looked at the Ferritto car and saw Carabbia in the back seat looking back at her in the direction of the explosion. Debbie Spoth later identified Carabbia as the man in the rear of the blue Plymouth.

Ferritto and Carabbia returned to Apt. 333. Ferritto returned to Erie; Carabbia went back to Youngstown, and Cisternino was last seen at the apartment.

About ten days later on a Saturday, Ferritto met with Cisternino and Licavoli at Sabatino's Restaurant in Warren, Ohio where they discussed the killing of Greene and Ferritto's compensation.

About a week later (due to the information received from the Spoths), F.B.I. agents, Cleveland police and Lyndhurst police searched Ferritto's home in Erie. After the search of Ferritto's home, Ferritto contacted Carabbia and said he would need money for an attorney. A few days later, Ferritto met with Carabbia and received $5,000. In the meantime, Ferritto had the blue Plymouth repainted brown.

Ferritto was eventually arrested and charged with the murder of Greene. He turned State's evidence and agreed to testify in exchange for a reduced sentence. Aratari was also arrested and agreed to testify in exchange for a reduced sentence.

Both Ferritto and Aratari testified at trial as to Cisternino's and Carabbia's involvement in the murder of Daniel Greene. Cisternino and Carabbia were convicted.

REASONS FOR DENYING THE WRIT

1. WHERE THE FACTS SHOW THAT AN EYEWITNESS IDENTIFICATION WAS NOT INFLUENCED BY A PRE-TRIAL PHOTO ARRAY IDENTIFICATION, THE DEFENDANT'S RIGHT TO A FAIR TRIAL IS NOT PREJUDICED BY THE TESTIMONY OF THE EYEWITNESSES.

The Ohio Court of Appeals properly recognized that the pre-trial photo array identification procedure used by the State was not suggestive and that there was no error in permitting Debbie Spoth to testify.

It should be noted at the outset that Ferritto testified that Carabbia was in the back seat of the car when Greene was murdered. Aratari testified that Carabbia was in the blue Plymouth with Ferritto, and Debbie Spoth testified Carabbia was in the back seat.

The relevant facts in the record are found at (R. 3256-3714, Volumes 9 and 10).

On October 6, 1977, at about 3:00 p.m., Daniel Greene was murdered by a bomb explosion in a car parked next to his. At that time, Debbie and Gregory Spoth were at the intersection of Brainard and Cedar Roads. Both Spoths saw Raymond Ferritto driving the blue Plymouth used as the get-away car, and Debbie Spoth saw Carabbia in the rear seat of the same car. Debbie Spoth looked right at Carabbia's face (R. 3411, Volume 9) as Ferritto pulled out from behind and around the Spoth car. In the courtroom, Debbie Spoth positively identified Carabbia as being in the back seat of the blue Plymouth (R. 3436).

Shortly after Ferritto drove past the Spoth car, the Spoths caught up with the blue Plymouth and recorded the

description of the car, its license number, and saw Ferritto driving again, but did not see Carabbia.

At about 3:45 p.m., October 6, 1977, Debbie Spoth called her father, a Berea police officer, to tell him what they saw (R. 3417). A series of phone calls followed between the Spoths and Officer Arthur Volpe (Debbie Spoth's father), and between Volpe and the Berea Police Department (to check out the license plate listing of the 1973 Plymouth). About 11:30 that night, Volpe contacted Lt. Andrew Vanyo of the Cleveland Police Intelligence Unit to give him some of the information that the Spoths had related to Volpe. Volpe refused to disclose the source of the information or the identities of the Spoths.

Thereafter, questions and photographs were passed back and forth by Lt. Vanyo and Lt. Joseph Wegas of the Lyndhurst Police Department to Volpe, who, in turn, relayed the questions and photos to the Spoths.

Photographs were sent by Lt. Vanyo on October 7 (and viewed by the Spoths on October 9); October 22 (and viewed by the Spoths on October 23); November 2 (and viewed by the Spoths on November 4); and December 2 (and viewed by the Spoths on December 4) (R. 3085-90). Out of the October 7th set of photos, the Spoths identified two photos of Ferritto—neither of which accurately portrayed Ferritto as the Spoths saw him. The Spoths then drew a sketch of Ferritto as they saw him, and a diagram of the intersection of Brainard and Cedar Roads (R. 3425-27). The diagram, sketch, and a questionnaire were eventually sent by the Spoths to the State via Volpe, Wegas, and Vanyo. (The sketch of Ferritto is St. Ex. 110; the diagram of the area is St. Ex. 111; the car description and license number is St. Ex. 112; and the envelope and questionnaire are St. Exs. 107 and 108.)

On the order of the county prosecutors, no law enforcement agency was to attempt to discover the identity of the then secret witnesses. Volpe had stated that the witnesses were not certain they were going to testify; the prosecutors did not want to attempt to put them under additional pressure so early in the case.

In February, 1978, the prosecutors learned that the witnesses were willing to meet openly with them and the police, and were willing to testify.

On the evening of February 16, 1978, Prosecutors Walsh and Marino, along with Lyndhurst and Cleveland detectives, met with the Spoths at Volpe's home in Berea for the first time.

At Volpe's home, in the dining room, Prosecutor Marino showed each witness separately a nine photograph array of the defendants, including Ferritto, Fratianno, and Calandra (R. 3392). Each witness readily identified Ferritto as being the driver; Licavoli from the newspapers; Cisternino from the newspapers, and that Ferritto claimed he was in the car with Cisternino (which both Spoths said was not so); and Carabbia (Debbie Spoth said Carabbia's picture looked like the man in the rear of the car, but she would have to see him in person to be sure (R. 3276)); Gregory Spoth was never sure of his ability to identify the man in the rear seat (R. 3383 and 3384).

That was the only meeting between law enforcement personnel and the Spoths until they met again with the prosecutors April 10, 1978, two days before they testified (R. 3453). On April 12th and 13th, the Spoths testified in court.

On April 12th the court granted a defense motion to voir dire both Spoths. Debbie Spoth related the circumstances of how she saw Ferritto and Carabbia, and identified

Carabbia in court as the man in the rear seat. Gregory Spoth related what he saw and identified Attorney Ralph Sperli as resembling the person he saw in the back seat (R. 3379). Gregory Spoth testified that from the photos he viewed on February 16, 1978, Carabbia's photo most resembled the man in the rear seat (R. 3382-85).

At the time Gregory Spoth picked Sperli as resembling the man in the rear seat, he was under considerable pressure. The courtroom was filled with spectators and news personnel; there were six defendants and ten defense attorneys at the trial table; and the court, much to the concern of the Spoths and the State, forced the Spoths to give their home address (R. 3287-89).

Overall, the facts show that Gregory Spoth was never able to positively identify Carabbia as being in the rear seat of the car.

It must be remembered that at the time the Spoths were shown the photographs by Prosecutor Marino (St. Ex. 109A-I) on February 16th, the State, F.B.I., A.T.F., Lyndhurst Police and Cleveland Police were fully convinced that Cisternino was in the rear seat of the car driven by Ferritto. The State had no idea that anyone other than Cisternino was in the rear seat. So, it came as quite a surprise that the Spoths tentatively identified Carabbia as being in the rear seat, and that they refuted Ferritto's contention that Cisternino was in the rear seat.

Louis Aratari was not apprehended until February 28, 1978 (R. 6221, Vol. 17). The State never even heard of Louis Aratari until he was arrested. Ferritto had given a sketchy description of two men hired by Anthony Liberatore to support Ferritto and Carabbia, but he did not remember their full names or addresses. The F.B.I. was in the process of investigating everything Ferritto told them, including the identity of the two support men.

When Aratari was arrested on February 28, 1978, it was then that the State discovered that Ferritto had lied about Cisternino being in the back seat. Aratari confessed, and stated that Carabbia was with Ferritto and him at Brainard Place when Greene was killed; and that he last saw Carabbia in the passenger seat of the blue Plymouth (R. 6182-6206, Vol. 16). (Aratari was not on the scene when Greene was killed. He left shortly before the explosion, and returned shortly after the explosion.)

The allegation that the procedure used to show the February 16th photographs to the witnesses was "outrageously suggestive" is in utter disregard of the facts. Debbie Spoth identified Carabbia at trial and Gregory Spoth did not. In light of that fact alone, how could the procedure possibly be deemed suggestive? Furthermore, on February 16th the prosecutors and all law enforcement officers connected with the case believed that Cisternino was in the rear seat. How could the procedure be suggestive if no one knew or even suspected Carabbia of being with Ferritto? That the procedure was proper and objective is shown by the fact that both Spoths knew Ferritto had publicly identified Cisternino as being in the car with him, and yet they tentatively identified Carabbia as the man in the rear seat knowing they were going against the statement of Ferritto; further, they positively excluded Cisternino as being in the car because he was much too young (R. 3281, 3382-84, Vol. 9).

The defendants complain that the court erred in refusing to order Prosecutor Marino to take the witness stand for voir dire. The record shows that all counsel for Mr. Carabbia wanted was a statement from Prosecutor Marino and that statement was made on the record (R. 3391-92, Vol. 9). Further, it is highly improper to involve counsel in a case as a witness because there is a danger

that it will appear to the jury that counsel had a personal interest in the case.

As for the issues concerning Debbie Spoth's "opportunity to observe", "length of time between crime and identification", "degree of attention", "accuracy of prior description", and "level of certainty", these are all matters of fact for the jury to decide. The trial court has no right or jurisdiction to decide matters of facts. In this case, the court properly decided that Debbie Spoth's testimony in full should be heard and considered by the jury.

The State notified the defendants as to the Ferritto lie as soon as possible; and that was after Louis Aratari was arrested on February 28, 1978. The State notified the court and defendants of Aratari's statement and the change in the State's case on the morning of March 3, 1978 (R. 965-999, Vol. 3). (See in particular Prosecutor Marino's statement to the court (R. 969-71, and 982-85).) After Aratari was arrested and confessed, Ferritto was confronted with Aratari's statement and he admitted the lie. The reason Prosecutor Marino could not state his reasons for suspecting that Carabbia was in the rear seat was because there was no substantive basis for believing that Ferritto lied. The only conflict at that time was the Spoths' tentative identification of Carabbia's photo. Only when Aratari was arrested was the State able to prove Ferritto lied by the use of Aratari's statement and Ferritto's admission that he lied.

The State was not about to reveal the identity or whereabouts, or even confirm the existence of the two secret witnesses—the Spoths. The prosecutors felt that every possible precaution should be taken not to jeopardize the witnesses or put any unnecessary pressure on them by way of public and media attention. Until they testified, no one—especially the defendants—knew for sure

whether there were actually any independent eyewitnesses or whether the State was bluffing.

Under the factual situation of this case, no law would ever require that a defendant or his representative be allowed to be present when such witnesses view a photo array as the Spoths did on February 16th. The importance of protecting innocent citizens who are eyewitnesses to a bombing murder perpetrated by the likes of the defendants, far outweighs any defendant's right to be represented at such a pre-trial proceeding. The defendants can cite no law that allows them such a right under these circumstances. By all the bounds of propriety, common sense, law, and morality, the first and foremost consideration of the law enforcement community is the protection of the innocent.

The defendants had plenty of time to adjust to the new evidence. The State gave them discovery of the new evidence on March 3, 1978; witness testimony began March 31, 1978.

These defendants had no right to be represented at such a pre-trial proceeding as occurred on February 16th under the circumstances of this case. This was the first time representatives of the law enforcement community were meeting with the witnesses; they were very apprehensive about testifying; and were extremely sensitive about their identity being disclosed. Under these circumstances, no prosecutor would ever permit any representative of defendants of this ilk to discover the identity of secret witnesses. Such misplaced trust in any agent of these defendants would only result in danger to the witnesses.

The accuracy of Debbie Spoth's identification and her ability to make such an identification, compared to Gregory Spoth's inability to identify Carabbia are all matters of

fact for the jury to consider. It would be contrary to our system of jurisprudence for the court to prevent the jury from considering such facts. In point of fact, Debbie Spoth was in a better position to see Carabbia than was Gregory Spoth. When Ferritto drove his car around and past the left side of the Spoth car, Carabbia was in the right rear seat looking back at Debbie Spoth, who was in the front left seat, driving. She was closer to Carabbia than was Gregory.

A review of the court's jury charge shows that the jury was properly charged on all material issues including eyewitness identification (R. 9772-9830, Vol. 26, in particular R. 9784). No special instruction was necessary because there never was any mistaken identification; there was only an inability to identify on the part of Gregory Spoth.

Further, the record shows, contrary to the court's instructions, that Attorney Ralph Sperli did tell the jury by his cross-examination that Gregory Spoth identified him (R. 3585, Vol. 9). This was a deliberate attempt to mislead the jury. Gregory Spoth identified Sperli as resembling the man in the back seat, and not as the man in the back seat (R. 3379, Vol. 9).

Throughout his voir dire and testimony to the jury, Gregory Spoth continually stated he could not identify the man in the back seat, but that a number of people in the courtroom resembled the man in the back seat (R. 3567).

There was no unreasonable restriction on defense cross-examination. The defense was allowed to show that Gregory Spoth thought others in the courtroom resembled the man in the back seat, and that Gregory Spoth could not identify anyone as being in the back seat.

A review of the record will show that the defendants' complaints are not well-founded. The court only precluded questions that were irrelevant, speculative, or not probative of issues involved.

The defendants' right to cross-examine their accusers was fully protected; there was no violation of their constitutional rights.

The cases cited by the defendants are not factually similar to this case. Here, there was no mistaken identification; there was only a tentative photo identification, and an inability to make a positive in-court identification.

2. THE TRIAL COURT MAY PROPERLY RESTRICT IRRELEVANT AND IMMATERIAL CROSS-EXAMINATION WHERE THE SUBJECT MATTER OF THE CROSS-EXAMINATION IS NOT PERTINENT TO THE TRIAL ISSUES OR TO THE PROTECTION OF A DEFENDANT'S CONSTITUTIONAL RIGHTS.

A revew of the record in toto reveals that the Sixth Amendment rights of the defendants were well protected. Considerable latitude was allowed the defendants in their cross-examination of State's witnesses.

The allegations made by the defendants in this issue are not supported by the overall record, or specifically, by their page cites.

The court properly ruled that Greene's relationship with the F.B.I. was totally irrelevant. The defense attempted to create an air of speculation without ever producing one piece of credible evidence that someone other than the defendants had killed Greene. Their attempts at involving others in the murder of Greene were intended to mislead the jury, and to focus attention on

someone other than themselves without ever providing any viable evidence that others were involved. To merely allege that "other individuals" might have a "more likely motive" to kill Greene than the defendants had, certainly is not sufficient reason or basis to allow rambling cross-examination. The defendants never presented any evidence that would support their alleged right to cross-examine State witnesses in those areas they were precluded.

Fratianno was never properly subpoenaed by the defendants. Frank Dovishaw was in no way connected with this murder—he merely helped Ferritto operate numbers and gambling. A review of Ferritto's testimony shows that Dovishaw never participated or assisted in the conspiracy to murder Greene; he was totally ignorant of Ferritto's involvement in Greene's murder until the F.B.I. contacted him to assist them in tracing the car, plates and ignition key.

Dovishaw made no witness statement. Other than helping the F.B.I. trace the get-away car, Dovishaw's knowledge of this crime is nil. Finally, the defense never properly subpoenaed Dovishaw to testify.

Debbie Spoth's knowledge of this incident is obviously limited to what she saw at the scene and her later dealings with the law enforcement community. She knew nothing of Liberatore and Lanci, and the court properly curtailed such cross-examination, if such questioning was pursued by the defense. (The defendants' page cite of (R. 2090-96) on page 65 of their brief must be in error. Whatever their intention is on making that cite, it definitely is not relevant to Debbie Spoth's testimony; those pages are the direct examination of Ronald R. Thomas.)

The defendants allege that two separate groups were involved in Greene's murder. The fact is the State tried

(in two separate trials) the following individuals as co-conspirators in Greene's murder; Licavoli, Lonardo, Sinito, Lanci, Liberatore, Calandra, Cisternino, Calabreeze, and Carabbia. (As stated in the State's opening statement (R. 1121-23).) All these men acted in concert in murdering Greene; they were all of one mind and organization. Again, it is the nature of a conspiracy that some participants perform some acts in furtherance of the conspiracy, and some participants perform other acts; and all are liable even if they don't precisely know who the other participants are, or what acts they are performing (Ohio Revised Code, Section 2923.01(C)).

The search of Fulton Fish Market was not relative to this case, and examination in that area was properly precluded.

The complaints of the defendants in this issue, are, by the record, unsupported by fact. Their attempts at cross-examining State witnesses on irrelevant or speculative matters was properly curtailed by the trial court.

The Ohio Court of Appeals properly upheld the trial court's ruling, noting that the defendants had failed to establish the relevancy of the attempted cross-examination.

3. WHERE A DEFENDANT FAILS TO ESTABLISH STANDING TO OBJECT TO A SEARCH, A TRIAL COURT IS LEGALLY JUSTIFIED IN DENYING THE DEFENDANT A HEARING ON A MOTION TO SUPPRESS.

The record shows that the defendants never established, or proffered any evidence that would tend to establish, that they had a right to object to the complained of searches. If the defendants had no right to privacy in the areas searched, then none of their constitutionally

protected rights to privacy were violated by the searches, and the evidence was properly admitted.

The facts of this case show that Raymond Ferritto's statement to the F.B.I., part of which was used as a basis for securing search warrants, contained one deliberate lie by Ferritto unknown to anyone but Ferritto. The lie concerned the active participation of both defendants in the murder of Greene. Ferritto first said that Cisternino was in the car with him when Greene was murdered, and that Carabbia was at Apt. 333, Winchester Hills Apartments, monitoring a radio for police calls. The truth was that Carabbia was with Ferritto when Greene was murdered, and Cisternino was at the apartment.

No one (except the defendants) knew Ferritto had lied on that one point. The first indication the State had that Ferritto was lying on that point, was when the prosecutors and police met with Debbie and Gregory Spoth for the first time, at Arthur Volpe's house, on the evening of February 16, 1978 (R. 3276, Vol. 9). At that time, Prosecutor Carmen Marino showed each witness a nine-photograph array that included all the defendants (St. Ex. 109-A-I). (R. 3277, Vol. 9). Each witness was shown the array separately and out of the view of the other. Debbie Spoth recognized the following photographs: St. Ex. 109-A, Licavoli (she saw his photo in the papers); St. Ex. 109-I, Ferritto (she saw him driving the get-away car); St. Ex. 109-G, Cisternino (she saw his photo in the papers or on television and knew he was called Butchie); and St. Ex. 109-H, Carabbia (the man in the back seat of the blue Plymouth) (R. 3452-53, Vol. 9). Gregory Spoth was not able to identify Carabbia as being the man in the back seat.

At that meeting on February 16, 1978, the State first started to question that part of Ferritto's statement con-

cerning the specific participation of Cisternino and Carabbia at the time of the killing. Until that time there was no indication that Cisternino and Carabbia were other than where Ferritto had placed them.

Meanwhile, Ferritto was continually being debriefed by the F.B.I. He related that a back-up team of killers (Ronaldo Giuliani and Louis Aratari) were hired to kill Greene if Ferritto and Carabbia could not. Ferritto described both Aratari and Giuliani. The F.B.I. was in the process of getting arrest warrants for Aratari and Giuliani.

On February 28, 1978 Louis Aratari was arrested by the Middleburg Heights Police Department on a related matter and subsequently turned over to the F.B.I. Louis Aratari confessed that he and Giuliani were hired to kill Greene, that Ferritto drove the blue Plymouth, that Carabbia was in the passenger seat when he last saw them at the scene of the bombing; and that Cisternino was not at the scene of the bombing.

When confronted with Aratari's statement, Ferritto admitted he had lied about the positions of Carabbia (who was a close friend) and Cisternino, because he felt Cisternino's incompetence had led to his arrest.

First, and most importantly, neither Carabbia nor Cisternino had their Fourth Amendment rights violated because all the evidence gotten by the search warrants were from locations and residences owned and occupied by persons other than the defendants. The defendants have no standing to object to the searches or the admission of the evidence because their rights to privacy were not infringed on. Therefore, these defendants never had any right or standing to request a hearing on the search warrants. The defendants never presented a factual basis for claiming their Fourth Amendment right to privacy

had been violated. Before the search warrants could be challenged, it was incumbent upon the defendants to show that the search infringed on their right to privacy. This was not done by the defendants because it could not be done. The searches were not conducted on any premises owned or leased by the defendants. Neither defendant ever showed a factual basis for claiming a right to privacy in the residences searched.

The facts show that there was no deliberate or reckless use of false information by any law enforcement organization. As soon as Aratari was apprehended and confessed, the State made known to the court and defense the matter concerning Ferritto's lie. The F.B.I. and Agent Kahoe never had any idea that Ferritto lied about the locations of Cisternino and Carabbia on the day of the killing. Ferritto's statement had been so completely substantiated and corroborated that the F.B.I. and Agent Kahoe had no reason to doubt him. Ferritto had always said that both defendants were co-conspirators.

Ferritto's statement, only part of which was used as the basis of the search warrants, is the statement of a co-conspirator and complicitor, not merely the statement of an informant. As such, there is more reliability to be placed on a co-conspirator's statement because of his ability to know the facts he is relating; his relationship with the other defendants; his participation in the crimes charged against the defendants; the disclosure of his identity; and the fact that all defendants knew he would confront them and that they would have an opportunity to challenge his credibility in court.

In *Franks v. Delaware*, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), the facts showed that an affidavit supporting a search warrant contained two possible constitutional violations: 1—the defendant's statement uttered by him to

a youth officer before he was given his Fifth Amendment warnings; and 2—affirmations that the affiant had talked to two people who knew the defendant and who allegedly corroborated the fact that he was usually dressed as the victim described him, which conversations the defense was prepared to show never occurred. Both of the above constitutional issues were material to the finding of probable cause for issuing the search warrant; and both issues, if ruled on favorably to the defendant, could possibly result in the suppression of evidence found at the defendant's house. The United States Supreme Court reversed the conviction and ordered that a hearing by the Delaware trial court was necessary to determine the validity of the defendant's claims; that the defendant did provide a substantial basis for challenging the truthfulness and veracity of the affiant. Most important in the Supreme Court's consideration, was the fact that the defendant's own residence had been searched.

In this case, only one statement was shown by the State (not defense) to be false, and that statement was not material to the issuance of the warrant because both defendants had always been implicated by Ferritto. There was absolutely no evidence that anyone (except the defendants) knew Ferritto had lied on that point.

The court properly denied a suppression hearing because the defendants failed to show how their rights were infringed on, and, regardless of whether or not a hearing is ordered, as long as the facts show the lie did not materially affect the warrant and that the lie was used knowingly and recklessly, the warrants are valid.

Further, there is no evidence that Ferritto's one lie, if excluded from the affidavit, would have resulted in a lack of probable cause. The affidavit is 27 pages long and contains an abundance of probable cause upon which the warrant is based.

The facts show that there was no deliberate use of false information by Agent Kahoe, nor that the lie materially affects the validity of the warrant, and, absent those two showings, the warrants are valid. (See also, *State v. Dodson,* 43 Ohio App. 2d 31 (1974).)

For the above reasons, but especially because the defendants have failed to show or allege how their rights were violated, the State contends the trial court acted properly in denying suppression hearings where the defendants failed to establish standing to object.

4. WHERE A DEFENDANT FAILS TO ESTABLISH A RIGHT TO PRIVACY IN THE AREA SEARCHED, HE LACKS STANDING TO OBJECT TO THE SEARCH AND HAS NO RIGHT TO CHALLENGE THE LEGALITY OF THE SEARCH AS IT RELATES TO HIM.

Before any consideration of the constitutionality of any search warrant issued by the Federal Court can be entertained it must first be alleged and proven by the defendants that their personal Fourth Amendment right to privacy was infringed on, and that the infringement resulted in the admission of evidence that materially and substantially affected their right to a fair trial. Absent the defendants' showing they have a right to object—standing—any search warrant used by the State or Federal Government is not subject to challenge by these defendants, nor is the evidence gotten by such warrant subject to challenge on the basis that the warrant is unconstitutional.

In regard to the search of Apt. 333, Winchester Hills Apartments, the facts show that the apartment was leased by Zolton Kalman (a fugitive the State and Federal authorities are still looking for). (See St. Ex. 137-A,

a rent receipt for Apt. 333 Re: Zolton Kalman, R. 5020, Vol. 13.) There is absolutely no evidence whatsoever that shows either defendant owned, leased or used that apartment (other than when they met there the day before they killed Greene); there is not even an allegation by either defendant that they had or expected a right to privacy in Apt. 333. The mere fact that the defendants met there one day to plan the murder of another human being does not give them any right to privacy in that apartment.

The defendants, having filed motions to suppress, each had the burden of establishing that his own Fourth Amendment rights were violated by the use of the search warrant and seizure of evidence. *Simmons v. U. S.*, 390 U.S. 377, 389-390, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968). "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be asserted vicariously." *Alderman v. U. S.*, 165 U.S. 174, 22 L. Ed. 2d 176, 89 S. Ct. 961 (1969). "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas v. Illinois*, 58 L. Ed. 2d 387 at 395, 435 U.S. 922 (1978). Also, *U. S. v. Jones*, 362 U.S. 257, 261 (1960). (The United States Supreme Court's discussion of standing and right to object to a search warrant in *Rakas v. Illinois, supra,* is most recent and definitive law on those issues. By that case most of the law cited by the defendants has been overruled.)

> "And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, *United States v. Calandra*, 414 U.S. 338, 347, 38 L. Ed. 2d 561, 94 S. Ct. 613, 66 Ohio Op. 2d 320 (1974), it is proper to permit only defendants whose Fourth Amend-

ment rights have been violated to benefit from the rule's protections. See *Simmons v. United States, supra,* at 389, 19 L. Ed. 2d 1247, 88 S. Ct. 967." *Rakas v. Illinois, supra* at 395.

This law also applies to the search of 919 Rondel. The apartment at 919 Rondel was rented by Donald Ready (R. 8338, Vol. 22). Neither defendant ever established an interest in or a right to privacy in that apartment. In fact, a review of Donald Ready's testimony (R. 8338, Vol. 22), shows that Ready claimed to be the owner of the evidence introduced by the State. (Donald Ready was convicted of perjury based on his testimony in the Greene case, on March 2, 1979, for his attempt to create an alibi for defendant Cisternino.)

The trial court properly denied the defendants' standing to object to the searches because the evidence shows that neither defendant ever substantiated his allegation of standing. A mere claim to have standing is not sufficient to gain standing. The defendants had the burden of showing the court some facts that supported their claim of protected privacy in the areas searched. The defendants did not even take the witness stand during the motion hearings to show they had some factual claim to object. Their entire motion was based on allegations by their attorneys.

The evidence seized from Rondel corroborated Ferritto's testimony and the State's contention that Cisternino had the capability to monitor F.B.I. and local police department radio transmissions in order to monitor and trace law enforcement activity with regard to the Greene bombing. Further, the key found in 919 Rondel was to Room 247 in a Holiday Inn occupied by Ferritto while he and the defendants were plotting to kill Greene.

The reference to the 919 Rondel apartment by Ferritto was the most current information the F.B.I. had in regard to that location. The reason it took until February 6, 1978, is because Ferritto did not remember the address, he only remembered the general location (near Kipling Avenue) and the house description. Because of that and severe winter weather conditions, it took the F.B.I. longer than expected to locate the house.

The defendants allege that the information was too "stale" to constitute probable cause. The very nature of case law demands that each case and its facts be considered separately. In this case a co-conspirator in a murder was apprehended and agreed to testify months after the planning and execution of the crime. Certainly as part of a thorough investigation the law enforcement community was obliged to investigate every possible source of information, and would be remiss if it failed to search one of the residences wherein the co-conspirators met to plan the killing regardless how long a time gap existed between the meetings and the discovery of the information.

U. S. v. Rosenberger, 536 F.2d 715 (1976), is supportive of the State's position. At page 719 the Court said:

> "Although it is clear that probable cause existing at some time in the past will not suffice for the issuance of a search warrant, circumstances may be established from which it may be inferred that grounds for the search continued to the time the affidavit was filed. See *Sgro v. United States,* 287 U.S. 206, 53 S. Ct. 138, 77 L. Ed. 260 (1932)."

The circumstances that permit the inference of probable cause to exist include the fact that the items searched for were not contraband of the type one would expect to

be destroyed, moved or altered. Further, 919 Rondel was more of a "hideout" than a residence, and as such the defendants did not expect the police to find the apartment.

The law cited by the defendants and by the State supports the contention that the passage of time alone does not cause facts to become "stale" to the extent they cannot be used to support probable cause.

In summary, the facts and law show that the defendants had no standing to object to the searches; that the evidence secured by the searches was relevant to the State's charge of aggravated murder and theory of conspiracy; that per Issue I the affiant did not knowingly and/or recklessly use false information; that, relative to the issues and facts in this case, the affidavit did contain timely information and that the information was acted on timely; that any evidence not relevant to the issues was excluded by the court without any harm to the defendants; and finally, the court did not err in denying standing to the defendants to challenge the validity of the search warrants because the defendants never established a right to claim standing.

5. A PROSECUTOR'S CLOSING ARGUMENT SHOULD BE CONSIDERED IN LIGHT OF THE NATURE OF THE CASE, THE FACTS PRESENTED DURING TRIAL, AND THE STRENGTH OF THE STATE'S CASE.

The State's case was overwhelming. Two of the conspirators testified that each defendant participated in the murder conspiracy; two private citizens identified Ferritto as the driver of the get-away car, and one identified Carabbia as being with Ferritto; finally, there was con-

siderable circumstantial and corroborative evidence that supported the testimony of the State's main witnesses.

Taking into consideration the nature of the case, and the considerable strength of the State's facts, the prosecutor's closing remarks did not deprive the defendants of a fair trial.

The State suggests that the question of law on this subject offered by the defendants is a grossly exaggerated principle. It is speculative, at least, to suggest that a jury was prejudiced by an attorney's closing comments, especially considering the jurors' oath, and the admonitions and law given by the Court. The State has been unable to find any State or Federal case wherein a juror claims to have been swayed or prejudiced by an attorney's comments. Case law that permits a defendant to raise such an issue has been excessively raised without any basis in fact to support such a contention.

These defendants ask that they be given a new trial because they claim they were denied a fair trial due to the prejudicial remarks of the prosecutor. If this is so, where is the evidence that the jurors were prejudiced? It is fast becoming apparent that this type of issue is the last resort of a defendant who can find no viable issue to raise on appeal.

The State contends that because of the strength of the State's case, the overwhelming evidence that convicted each defendant, and the fact that all allegations by the defendants are taken out of context, there was no reversible error committed by the State.

CONCLUSION

The defendants have failed to raise any issue of great public interest, or any substantial constitutional issue not already properly decided by the Ohio Appellate Ccurts.

The State respectfully requests that this Supreme Court deny the defendants' Petition for Writ of Certiorari.

Respectfully submitted,

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